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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-716

NATIONAL AUTO BROKERS CORP., et al.,

Petitioners,

-against-

GENERAL MOTORS CORPORATION, et al.,

Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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This reply by petitioners, under subparagraph 4 of Rule 24 of the Rules of the Supreme Court, is addressed to arguments first raised in the brief in opposition.

I.

THE REPRESENTATION BY THE DISTRICT JUDGE AND HIS LAW FIRM WAS "RELATED" TO THIS CASE

Respondents try to limit petitioners' first question to the district judge's representation of the GM Defendants "in a matter unrelated to this case" (p. 2, and note 1 at p. 6, Resp. Br.). Petitioners' first question clearly assumes that representation of GM, GMAC and a top GM management committee by the district judge and his law firm in the antitrust and Dealer-Day-in-Court Act areas was, in fact, representation by the judge and his law firm in a "related" or "connected" matter.

A most important sub-issue is whether contemporaneous antitrust litigation and representation for an organization (at least in one line of its business) is related to antitrust litigation brought against such organiza-

tion by any plaintiff (at least as to such line of business). The answer, for reasons set forth below, is clearly in the affirmative.

"Related Matters" or
"Connected Matters"

Respondents cite 4 cases for their proposition that the judge should have disqualified himself only if the present case was a "related matter" (p. 6, ¶ 1, Resp. Br.), but fail to discuss what constitutes a "related" or "connected" matter. The standard is set forth in Carr v. Fife, 156 U.S. 494, 498 (1895) as "matters not connected with the present case".

Petitioners urge that this Court elaborate upon such vague standard, to guide the courts and bar, by defining "related matter" or "connected matter" for purposes of application or not of 28 U.S.C. §§ 144, 455 (1970) and 455 (1976) to

consist of or include the following matters or involvements ("proposed standards"):

1. if a judgment in one matter would require application of the doctrine of res judicata in the other;

2. if a judgment in one matter could have involved application of the doctrine of collateral estoppel in the other;

3. if the information which the judge or his firm obtained by reason of the prior representation would permit the judge or any of his partners or associates to be a fact witness in the present case, but for the attorney-client privilege;

4. if, through the prior representation, the judge or his firm has knowledge

of any part of the facts in dispute or what reasonably might be admissible evidence in the present action;

5. if the judge or his firm represented the party as to similar types of issues or litigation and it would be reasonable to anticipate that either would be familiar with all or part of such party's (i) evidence; (ii) expert witnesses; (iii) litigation strategy; or (iv) documents which might reasonably be called upon for production by the opposing party relevant to the present case (e.g., tire blow-out cases for a tire manufacturing company, or "Pinto" cases involving gas tank explosions upon rear-end collisions);

6. for period of the applicable limiting period under state law (3 years, § 214,

subd. 6, New York CPLR) after leaving the firm or discontinuance of related representation, if the judge could be liable for any possible malpractice of his law firm for rendered legal advice to such party which could be in conflict with any of the decisions which reasonably could be made by the judge in the present case; or

7. for a reasonable period of time, say 3 years, after the judge is appointed to the bench, if his firm continues to represent the party, to permit payouts to the judge and economic disentanglement by the judge from his former law partnership (e.g., to permit resolution of any claims against the firm for which the judge as former partner would be personally liable (in the event of non-payment by the firm) and to permit

orderly repurchase of the judge's interest in the firm).

Each of the foregoing proposed standards (except Nos 1 and 7) would have disqualified Judge Griesa from handling the present antitrust case against the GM Defendants. If, on the other hand, the judge's law firm had represented GM solely in tire blow-out cases, only proposed standard No. 7 above would have disqualified the judge (inasmuch as the judge was assigned this action as soon as he became a judge), because of the judge's presumed continuing financial interest in the firm.

Application of some parts of the foregoing proposed standards in elaboration of "related matters" and "connected matters" is discussed below.

Knowledge of Admissible Evidence

Violations of the antitrust statutes by the GM Defendants would have been admissible evidence for petitioners in this action, brought under §§ 1-3 of the Sherman Act. E.g., Rule 404(b), F.R.E., evidence of crimes to prove intent to violate the antitrust laws; and Rule 406, F.R.E., evidence relating to routine pratices of an organization, to show wilful interference with other new-car "brokers". Thus, the judge had actual or constructive information of a confidential nature (attorney-client privilege) about GM's actual or possible violations of the antitrust laws. As to such information, the judge was being called upon by petitioners to order the GM Defendants to disclose the information to petitioners (the judge ruling against petitioners in most or all of such requests). Also, the judge had the duty to hear and determine these matters as to which

he had actual or constructive information of a confidential nature. How he did this in fairness to all of the parties is unknown to petitioners, and could not be even guessed at by reasonable persons, who would conclude there was something improper and unworkable about any such arrangement. Did the judge decide issues of fact against petitioners (such as his denial of petitioners' preliminary injunction motion or grant of respondents' motion for a directed verdict) through his exposure to the confidential information obtained from GM? Did he refuse discovery to petitioners as to other antitrust violations so he would not have to review matters which had been passed on by his firm or as to which he, or members of his firm, could have been a witness, if known to petitioners? To what extent did his continuing professional obligation to GM not to disclose information obtained by him or the firm from GM make him unable to objectively look at issues of anti-

trust violations raised by petitioners, the petitioners' discovery requests, preliminary injunction motion, petitioners' trial subpoenaes, damage claims, admissibility of the permanent injunction against GM in the California case or otherwise?

GM's activities in actual or possible violation of the antitrust laws are related issues (and representation by the judge's firm is representation in "related" or "connected" matters) regardless of the plaintiff who is suing. The related matter is GM's activities. Plaintiffs' own damages caused by such GM activities are less "related", although they could still be related under proposed standard 5 and even 2, 3 and 4 above.

Accordingly, the judge should have disqualified himself under proposed standards 2-5 above.

Application of Doctrine
of Collateral Estoppel

Representation of GM in antitrust litigation would necessarily involve the representation of GM in matters in which the outcome of such cases could, or could not be, admissible as evidence in support of petitioners' antitrust (Sherman Act) claims depending on the outcome of the original litigation (also as to petitioners' Robinson-Patman Act claims), depending on the outcome of the original litigation, based on evidence seen by or known to the judge or his firm, and not by petitioners herein or their counsel.

Liability of the Judge
for Malpractice of Firm

The judge had liability as a firm partner for any professional malpractice of such firm to GM in the antitrust area, committed prior to his departure from the firm (a few days before he was assigned this case for all purposes).

It is possible that such malpractice liability against the firm could have been established if the judge had ruled in this action that any part of the GM new-car distribution system violated any of the antitrust laws (fleet allotments, fleet certificates, discriminatory pricing, retail allotments).

Accordingly, the judge should have determined this action was a "related" or "connected" matter to his firm's prior and continuing antitrust representation of GM and disqualified himself at the outset and when repeatedly requested to do so under proposed standard 6 above.

Dealer-Day-in-Court Act
Representation of GM
Is Also a Related Matter

Even the GM litigation by the judge's firm under the Dealers-Day-in-Court Act was a "related" or "connected" matter, the judge's

law firm having represented GM against charges that GM was improperly threatening to take away the dealer's franchise. In this action by petitioners, they alleged that GM was illegally threatening GM dealers with loss of their franchises if they sold cars to Nabcor (a continuation of the business practices alleged in the suits under the Dealer-Day-in-Court Act against GM); also, petitioners were attempting to represent all GM dealers as a class against GM (as to various Robinson-Patman claims, particularly that leasing was the equivalent of sale in many situations).

II.

NEITHER PETITIONERS NOR THEIR ATTORNEY KNEW BEFORE TRIAL OF THE FIRM'S RECENT ANTITRUST REPRESENTATION OF GM

Petitioners made their oral recusal motion at the outset of the 1st trial day after petitioners' counsel learned (on the preceding

day off from trial) that the judge's firm represented GM at the time the judge was appointed to the bench and this case. The judge stated during the proceeding that he had personally worked on a GM or GMAC matter, and denied motion. Petitioners' attorney then researched, prepared, obtained execution of and filed an affidavit of prejudice, only 2 trial days thereafter (while continuing the massive antitrust trial single-handedly), based on the same information plus the disclosures made by the judge and respondents' attorneys.

Petitioners' counsel (as distinguished from any of the petitioners) knew months before the trial that 23 years prior to the trial the judge's law firm had represented GM in a major antitrust suit, but about 10 years or more before the trial in this present action believed, reasonably, that all of such legal representation

had gone to respondents' attorneys (at least as early as the 1960's Nader-GM problem). None of the petitioners was aware of this relationship until the day the affidavit of prejudice was executed and filed, because the representation 23 years before was not considered important by petitioners' counsel, until he learned from an associate of the firm that the judge's firm continued to represent GM up to and beyond the time when the judge became a judge and was assigned this case. Burpus v. Uniroyal Tire Co., Division of Uniroyal, Inc., 385 F.Supp. 711 (E.D.Pa. 1974) held that a 10-year period was too long to require disqualification of the judge, a former partner of the firm.

III.

FAILURE OF THE TRIAL JUDGE TO DISQUALIFY HIMSELF WAS HARMFUL

If the judge was disqualified and had disqualified himself when requested to do so, petitioners' case could have been quite different from its present posture (according to respondents' arguments about alleged insufficiency of evidence). This assumes that the judge would have declared a mistrial, removed himself, a new judge would have been appointed, and petitioners would have been allowed to develop their whole case before the qualified judge during pre-trial proceedings and trial.

Each denial of petitioners' repeated discovery efforts, each decision by the judge on the admissibility or not of offered evidence, termination of the trial without permitting plaintiffs to call GM as a witness or without

requiring respondents to put on their case — these and other decisions by the disqualified judge could have materially affected the outcome of the case, even assuming respondents' argument that petitioners had insufficient evidence by the end of the trial proceedings before the disqualified judge.

Respondents even argue that whether or not petitioners had a case is irrelevant, because the Supreme Court does not review such matters. This is a strong argument for this Court to grant certiorari, to review the disqualification issues, because petitioners have no other remedy for the damage done (or which appears to have been done) to their case by the disqualified judge. As a practical matter, litigants have to live with most, if not all, of the rulings the courts below have made, and petitioners' only practical remedy under such circumstances is to show that the judge should

not have made any of such rulings, because of his actual disqualification throughout the entire period of pre-trial proceedings and trial, and his failure to remove himself when requested to do so.

The difficulty in proving what evidence a party was not permitted to obtain by adverse rulings of a disqualified judge makes respondents' argument illogical and frivolous. If the judge should have disqualified himself, petitioners should have the opportunity to develop their case before a judge not so disqualified, which will result in a different record, based upon different pre-trial decisions by the court and different litigation emphases and strategies by counsel. The needless expenditure of time and money by petitioners and their counsel trying to overcome the adverse rulings and anticipated adverse rulings by the disqualified judge prevented petitioners from

seeking needed evidence in other ways. Petitioners were damaged, therefore, by a diversion of their time and money seeking to obtain evidence and having to provide discovery under adverse rulings by a disqualified judge, without being aware of the judge's disqualification.

It is of utmost importance to the judicial system that parties be entitled to make legitimate use of the federal recusal statutes, to prohibit further damage to their cause by a judge who is disqualified to serve through the reasonable appearance of impropriety (the federal standard rather than any showing of actual impropriety).

To say that an appearance of impropriety is meaningless (Respondents' Br., p. 8, ¶ 5) because the disqualified judge has ruled that the party had no evidence anyway

is wholly circuitous and unworthy of GM and counsel to make before this or any other Court.

Virtually any reasonable man would say, under the circumstances of this case, that the district judge should have recused himself (a) because he was in fact biased against petitioners and their counsel; and (b) because he would have appeared to reasonable persons to be prejudiced — both for extrinsic or extra-judicial reasons (the prior representation of GM in "related" or "connected" matters, as defined above by proposed standards 1-7; i.e., the prior and concurrent antitrust representation of GM by the judge's firm). Yet, the judge himself and a Second Circuit panel (having similar disqualification problems, relating to ownership of GM stock) found themselves unable to arrive at this obvious and necessary conclusion.

One wonders about the extent to which the district and appellate judges are following the standards required under the federal recusal statutes, and expected of them by reasonable persons. It is possible that since the present case is the only case of its type (any kind of representation which clearly should have been held to be a "related" or "connected" matter under the proposed standards 1-7 above) that all other federal judges have recused themselves under such circumstances, and that Judge Griesa (and the Second Circuit in this case) have construed the law erroneously.

This Court should grant petitioner's request and take the opportunity to state its position on this most important issue in the fair administration of our federal justice system.

Also, it should be noted, that based upon the Second Circuit's opinion in this severed action (called the "A" action), Judge Griesa has refused to recuse himself under 28 U.S.C. §§ 144 and 455 in each of the other 3 severed actions ("B", "C" and "D" actions) constituting the remainder of the original Nabcor Action, as well as one other action commenced by Nabcor against 1 original defendant and 2 new defendants. The the issues in the petition are important as to at least 4 additional cases, and should be resolved by this Court.

IV.

RESPONDENTS WITHHELD A DOCUMENT AND THEREBY HID FROM PETITIONERS' ATTORNEY THE REPRESENTATION OF GM BY THE JUDGE'S LAW FIRM

As soon as petitioners' attorney made his oral recusal motion, one of respondents' attorneys told the judge (falsely) that during pre-trial proceedings he had delivered a document

to petitioners' attorney which disclosed on its face that GM was represented by the judge's firm. The attorney did not say whether this occurred before or after the judge was appointed to the bench and this case.

Petitioners immediately (and truthfully) denied that any such document was ever produced or shown to petitioners' attorney, and demanded once in the District Court and twice in the Second Circuit that respondents' attorneys produce such document, but no document or explanation was forthcoming. All of this is in the record.

The district judge said, at the time, that he thought the issue of his disqualification had been raised by someone already in this action; but this was not by petitioners or their counsel, or within their presence or to their knowledge, as the record shows.

The record does reflect an ex parte communication between the district judge and four GM attorneys, on the eve of trial, at the judge's request (subject-matter unknown).

V.

PETITIONERS RAISE THE ISSUE OF ACTUAL BIAS OF THE DISTRICT JUDGE

Petitioners' first question states "whether biased or not". By this, petitioners included both issues of petitioners' entitlement to grant of the recusal motions

(1) whether in fact the judge was biased, and

(2) even if the judge was not actually biased.

Clearly, petitioners' lengthy quotations from the record show actual bias and should have led GM's counsel to the conclusion, but they decided to avoid the issue in this Court by falsely claiming that no such issue was raised.

Also, the petition states: "Throughout the trial, Judge Griesa displayed an obvious bias against plaintiffs and their counsel, saying...." (p. 22, Pet.) Petitioners argue that the bias arose from the extra-judicial circumstances of the judge's relationship, immediately before his appointment to the bench and this case, with GM, GMAC, the top GM or GMAC management committee, the judge's law firm (representing GM) and the "related" or "connected" (antitrust) matters in which the firm was representing GM, prior to and at the time the judge was appointed to the bench and was assigned this case for all purposes.

VI.

RESPONDENTS' BRIEF SHOULD BE DISREGARDED FOR LACK OF CANDOR

Respondents' brief is typical of their litigation tactics in this action, e.g., now claiming that the record does not show

withholding of the document from petitioners; respondents' repeated failure to produce the document after demand therefor; respondents' material distortion of petitioners' issues and failure to discuss the following issues:

(i) a substantial number of inordinate new-car delivery delays by GM of the cars ordered by petitioners;

(ii) actual prejudice of the judge (respondents falsely claiming that petitioners did not raise such issue);

(iii) falsely claiming that petitioners and their counsel knew that GM was represented by the judge's firm when he was appointed to this action;

(iv) failing to deny or even discuss the fact that respondents and their counsel knew about the judge's relationship with GM at all times, and said nothing to plaintiffs or their attorney.

Conclusion

The Second Circuit's conclusion that Nabcor's business was based on an "unsound idea" (Resp. Br., p. 12) is a factual conclusion borrowed from a judge who should have disqualified himself from the very beginning of the case, and is a conclusion of fact not supported by the record. There is substantial evidence in the record, including GM's own documents and testimony by the GM President, that Nabcor's business was the first of its kind and was a serious threat to GM's dealers and would injure GM's own business (in competition with Nabcor in the distribution of new GM cars), and that Nabcor was put out of business by a conspiracy involving refusals to deliver ordered cars, refusals to deliver cars on time (involving inordinate delivery delays to Nabcor and, therefore, Nabcor's customers and brokers), and an artificial system of new-car shortages when Nabcor wanted cars while new cars were always

plentiful for customers approved by GM.

Petitioners should have the opportunity to develop by pre-trial proceedings and then trial, before a qualified judge, that petitioners' business was sound (but for the violations of law of which petitioners complained) and that respondents destroyed such business in violation of the antitrust laws (even if this Court decides that it will not review the presented issue of sufficiency of evidence).

The 8 years of litigation (mostly before a disqualified judge) known to be such by only respondents, their attorneys and the judge, is an intentional diversion and waste of the litigation time and money of petitioners and their attorney, with injurious effects upon the federal courts, which prevented petitioners from obtaining a fair trial and has made the judicial system up to this point somewhat suspect to petitioners and many others

watching this most important case.

Respondents and others should not be encouraged to repeat this performance in other cases by giving respondents and their counsel the unwarranted rewards of such litigation strategy. The federal court system will itself suffer to permit this type of litigation success, and encourage more of the same, including prolonged antitrust trials before former attorneys for the defendant (with little or no hope for the unknowing plaintiffs and their counsel).

For the foregoing reasons, and the reasons advanced in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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